IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.850 & 1021/Kol/2007
Assessment Year :1996-97

ICI India Ltd. 8B Middleton Street, Kolkata – 700 071 [**PAN No.AAACI 6297 A**] DCIT, Circle-10, 3 Govt. Place (West) Kolkata	**V/s.** **V/s.**	DCIT, Circle-10, 3 Govt. Place (West), Kolkata M/s ICI (India) Ltd. 34, Chowringhee Road, Kolkata-71
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No. 2048 & 2355/Kol/2005
Assessment Year: 1996-97

ICI India Ltd. 34, Chowringhee Road, , Kolkata – 700 071 ACIT, Circle-10, 3 Govt. Place (West) Kolkata	**V/s.** **V/s.**	DCIT, Circle-10, Ayakar Bhavan, P-7, Chowringhee Square, Kolkata- 700 069 M/s ICI (India) Ltd. 34, Chowringhee Road, Kolkata-71
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No. 487 & 507/Kol/2006
Assessment Year: 1998-99

ICI India Ltd. 34, Chowringhee Road, Kolkata – 700 071 ACIT, Circle-10, 3 Govt. Place (West) Kolkata	**V/s.** **V/s.**	DCIT, Circle-10, 3 Govt. Place (West), Kolkata M/s ICI (India) Ltd. 34, Chowringhee Road, Kolkata-71

अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri R.N.Bajoria, Senior Counsel
राजस्व की ओर से/By Revenue	Shri Niraj Kumarm, CIT-DR
सुनवाई की तारीख/Date of Hearing	15-10-2015
घोषणा की तारीख/Date of Pronouncement	27-11-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These are cross-appeals filed by the assessee and Revenue which are directed against the order of Commissioner of Income Tax (Appeals)-X, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for assessment years 1996-97 and 1998-99 respectively.

2. These bunch of appeals filed by the assessee and revenue pertain to the issues of the same assessee for the different assessment year, therefore for the sake of convenience, we heard all these appeals together and disposing the issues involved by this common order.

Let us take the assessee's appeal in ITA No. 850/Kol/2007 A.Y. 1996-97

3. The first issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of the AO for the liability on account of leave encashment which has been crystallized although has not fallen due for payment as on 31st March, 1996.

4. Briefly stated facts are that during the year assessee has debited its profit and loss account by an amount of ₹4.90 crores towards provision for leave salary. On question raised by Assessing Officer on the allowabilty of

said provision for leave salary as deduction, the assessee submitted that liability on account of leave salary has been worked out on the basis of leave lying to the credit of each member of the staff as on 31st March, 1996. Assessee further submitted that this amount has not fallen due for payment as on 31st March, 1996 but the liability for the same, has been crystallized. So under mercantile system of accounting, it should be considered as accrued liability and should be allowed as deductable expenditure. However, AO disregarded the claim of assessee and treated the same as contingent liability as it has not accrued during the previous year. It merely represents the provision of liability, therefore the same was disallowed.

Aggrieved, assessee preferred an appeal before Ld. CIT(A) who upheld the action of AO by observing as under:-

> *"The appellant made a claim towards liability on account of encashment of leave. The claim represents an amount quantified on the basis of leave lying at credit of the staff member. The amount has not fallen due for payment as on 31.3.96. Further, it is not a crystallized liability and is in the nature of a provision to meet the contingent liability. The AO is correct as per law in disallowing the appellant's claim for deduction. The AO's action is upheld. This ground of appeal fails and is rejected."*

Aggrieved assessee is in appeal before us.

Shri R.N. Bajoria, Ld. Senior Authorized Representative appearing on behalf of assessee and Shri Niraj Kumar, Ld. Departmental Representative appearing on behalf of Revenue.

5. We have heard rival contentions of both the parties and perused the materials available on record. Ld. DR relied on the orders of authorities below. Ld. AR submitted a paper book running pages from 1 to 204 and submitted that the liability for the leave encashment has been accrued and crystallized. Therefore, it is not a provision at all for leave encashment and submitted that the accrual of expenditure under mercantile system of accounting is an allowable expenditure.

From the aforesaid discussion, we find that assessee has made the provision for the expenses of leave encashment of those employees having the unutilized leave balance credited in their respective account. The assessee claimed the deduction of the provision created for the leave encashment in the books of accounts. However the AO and the Ld. CIT(A) treated the provision for leave encashment as contingent liability and therefore disallowed the same. The dispute here is that the assessee claims that the liability of the employees for leave encashment has been crystallized at the yearend but has not fallen due for payment. The liability for the payment will arise in future when the employee exercises his option for the encashment of the salary. On the other side the Ld. DR claims the provision for leave encashment as contingent liability. Contingent liability is potential obligation that may be incurred depending on the outcome of a future event. A contingent liability is one where the outcome of an existing situation is uncertain, and this uncertainty will be resolved by a future event. From the above discussion we understand that the liability is certain for the provision of the leave encashment. It is not a contingent liability because the employees are very much entitled for getting the leave encashed as per the policy of the company. We find from the judgment of Hon'ble Supreme Court in the case of *Bharat Earth Movers* 245 ITR 428 (SC) has allowed this kind of expenditure u/s 37(1) of the Act. The relevant extract of the order is produced below:-

> *"Section 37(1) of the Income-tax Act, 1961 – Business expenditure – Year in which deductible – Assessment year 1978-79 – Whether if a business liability has definitely arisen in accounting year, deduction should be allowed although liability may have to be quantified and discharged at a future date but what should be definite is incurring of liability – Held yes – Provision was made by assessee-company for meeting liability towards leave encashment proportionate to entitlement earned y employees of company subject to ceiling on accumulation as applicable on relevant date – Whether assessee would be entitled to deduction of such provision out of gross receipts for accounting year during which provision was made for liability inasmuch as liability was not a contingent liability - Held, yes."*

The fact in the instant case is similar to the case of *Bharat Earth Movers* (supra). Now from the above facts, it is clear that liability towards leave encashment is a definite liability which has accrued and arisen during the year ending on March of this year. However, payment of the same does not fall during the relevant previous year but under the mercantile system of accounting this expenditure requires recognition in the books of accounts. In view of the above, we allow this ground of assessee's appeal.

6. Next ground raised by assessee in this appeal is that Ld. CIT(A) has erred in confirming the action of AO for disallowing the liability of Voluntary Retirement Scheme (VRS for short) for an amount of Rs. 6.30 crores.

During the year assessee has debited a sum of Rs.13.20 crores on account of provisions of VRS. During the year 735 employees opted for VRS. As a result of this the liability accrued to the assessee for an amount of Rs. 13.20 crores during the year. However, the pattern for the payment of retirement benefit was fixed in three installments spreading over a period of three years- April 2000, April 2001, April 2002. So it is clear that the liability has crystallized to the assessee in the assessment year 1996-97 but not falling due for payment in the year under consideration. The AO noticed from the note-10 of schedule 20 of the balance sheet that in last year the assessee was accounting the cost of VRS based on actual payments. During the previous year 1995-96 assessee has started treating the total VRS liability as deferred revenue expenditure. The payment of the same shall be made in the future years. Accordingly the assessee worked the VRS liability and claimed the deduction of Rs. 13.20 crores in the year under consideration. During the assessment proceedings, AO investigated the severance agreement of the staff who opted for VRS during the year under consideration which is reproduced below:-

> *"On cessation of the above monthly payment, you will also be paid the following amount on the date as mentioned below:-*
>
> *Amount* *Date*

Rs.96195/-	*Apr.2000*
Rs.96195/-	*Apr. 2001*
Rs.96195/-	*Apr. 2002*

The aforesaid amount(s) has been calculated on the basis of your Basic Wage/Salary and Dearness Allowance as of Feb95. The above mentioned amount will accrues and become due to you on the dates shown against them and each amount will be paid to you on or after the day following the date of accrual. It is expressly agreed between the company and yourself that you will have no right, interest or claim whatsoever in respect of any of these amounts until the date due to you. It should be clearly understood that consequent upon your acceptance of this offer, the tenure of your employment with us shall cease with effect from 2 Apr. 95"

The AO found that on cessation of monthly payment, the staff will be paid the following payments on the dates as mentioned below:-

Amount	Date
Rs.96195/-	April, 2000
Rs.96195/-	April, 2001
Rs.96195/-	April, 2002

From the above, AO found that as per the severance agreement the liability for the payment of VRS crystallized in the assessment year 1996-97 but the payment has not fallen due in the relevant year. The AO further found that during the relevant year the actual payment for VRS made of ₹6,90,77,772/-. Therefore, AO held that payment of VRS which has actually been paid will be allowed as an expense and the balance of ₹6,29,22,228/- will not be allowed in the year under consideration. Accordingly the AO has disallowed the same and added to the total income of the assessee.

7. Aggrieved, assessee preferred appeal before Ld. CIT(A) who has upheld the action of AO by observing that amount payable in future are not crystallized expenditure of this year. The appellant is entitled for a deduction of the VRS payments on the basis of payment in the year of actual payment. The disallowance made by the AO is correct since the unpaid amount claimed

is in the nature of a provision to meet the future liability. The AO's action is upheld. This ground of appeal fails and is rejected. Aggrieved, assessee preferred second appeal before us.

8. We have heard rival contentions of both the parties and perused the materials available on record. Ld. DR vehemently relied on the orders of authorities below. Ld. AR submitted that as per the scheme of the company for VRS, the employees of the company have the option either to take the lump sum consideration in one go or in terms of various installment of the various amount. Once the agreement for severance has been signed by the employee the liability for the VRS amount become crystallized in the year of signing the agreement. Hence the timing of payment for the VRS amount is not relevant. So the liability for the same has to be recognized for the same and assessee prayed for the allowabilty of the VRS amount. In support of its claim assessee has submitted the following case laws:-

1. CIT v. Alim Bag Salim Bhai 163 ITR 767 (MP)
2. Kalekhan Mohammed Hanif v. CIT 163 ITR 769 (MP)
3. Kedarnath Jute Mfg. Co. Ltd. v. CIT 82 ITR 363 (SC)
4. Metal Box Co. of India Ltd. v. Their Workmen 73 ITR 53 (SC)
5. ITAT, Kolkata C Bench Rallis India Ltd. v.DCIT

Ld. AR also submitted that this Tribunal's order in assessee's own case in **ITA No. 851/Kol/2008, 1018/Kol/2007 & 1640/Kol/2008** for AYs 2000-01 and 2001-02, involving the exactly similar facts where the decision was in favour of assessee. From the aforesaid discussion, we find that during the year 735 employees had opted for VRS as per the scheme of the assessee. Accordingly the expense to be made towards VRS to those staff has become definite expense. Although the payment of VRS was due in future date. Therefore the AO has disallowed the expenditure and same was confirmed by Ld. CIT(A) as it was not due for payment in the year under consideration. However, we find that this Tribunal has decided in assessee's own case

where the expenses for VRS was allowed and keeping a consistent view we reverse the orders of authorities below. Hence this ground of assessee's appeal is allowed.

9. In the result, assessee's appeal is allowed.

Coming to Revenue's appeal in ITA No. 1021/Kol/2007 A.Y. 1996-97

10. First issue raised by Revenue is that Ld. CIT(A) erred in allowing the excessive depreciation for an amount of ₹13,77,12,314/-.

Before we come to the specific issue raised by Revenue it is better to understand the history of the facts of the case which goes as under:-

During the FY 1993-94 relevant to AY 1994-95 assessee has sold two undertaking for an amount of ₹85 crores as going concern. The assessee claimed in his return of income for those years Long Term Capital Loss under section 48 of the Act. However then the AO was of the view that there was sale of depreciable assets and therefore the section 50 was applicable to this transaction. Since the assessee did not provide the breakup of the sale consideration, he treated the entire sale consideration as sale of depreciable assets and worked out the Short Term Capital Gain under section 50 of the Act. Now coming to the issue of relevant year under consideration, the AO has followed the same practice by reducing the sale consideration of the undertakings then sold in the assessment year 1994-95 and 1995-96 respectively from the WDV of block of assets. The facts of the relevant year are that during the FY 1993-94 relevant to AY 1994-95 assessee has sold two undertaking for an amount of ₹85 crores as going concern and the AO reduced the same from Written Down Value (WDV for short) of block asset as on 01.04.1993. During the FY 1993-94 a new asset aggregating to ₹58.68 crores was acquired. However, the closing stock closing WDV of the block of asset remains at nil value after making the adjustment of sale and purchase of the fixed assets. So the opening WDV as on 01.04.94 was taken as nil value. During the previous year 1994-95, assessee acquired asset worth

₹13,26,14,110/-. During the same FY assessee sold the undertaking for an amount of ₹3,13,25,013/-. So WDV at the year end at ₹10,12,88,096/- on which a depreciation for an amount of ₹1,87,35,787/- was claimed. Hence, WDV as on 01.04.1995 comes to ₹8,55,62,309/-. During the FY 1995-96 which is under consideration the assessee acquired asset of ₹31,35,33,795/- and sold its undertaking for an amount of ₹30,28,05,318/- which was deducted from WDV of the relevant block. The WDV coming at the year end i.e 31.03.1996 at ₹9,62,80,786/- only. The depreciation allowable comes to ₹1,29,37,156/- on this WDV. However, assessee has claimed depreciation of ₹15,06,49,470/-, therefore, AO held that the excess depreciation has been claimed by assessee for an amount of ₹13,77,12,314/-(15,06,49,470-1,29,37,156) and he disallowed, added to the total income of the assessee.

Aggrieved, assessee preferred appeal before Ld. CIT(A) who deleted the addition made by AO by observing as under:-

> *"The appellant claimed depreciation of Rs.13.77 crores which is disallowed by the AO. The AO disallowed the depreciation since the sale consideration of the fertilizer and fibre units, is reduced from block of assets and the block is reduced to nil. Hence, depreciation is disallowed. As per the decision of the ITAT in the Corromondal Fertilizer, the WDV of the unit sold, is to be reduced from block of assets. Depreciation is allowable on the balance value of the block of assets relating to the business units which are not sold and used by the appellant for business. In the appellant's case, the WDV of the assess belonging to fertilizer and fibre division is to be reduced from block of assets and depreciation is required to be allowed on the assets used by the appellant for the business. The AO is directed to examine the details and to allow depreciation on the WDV of the assets other than those relating to the business sold as going concern. The AO is directed to examine the details and allow the depreciation as per law."*

Aggrieved, Revenue is in appeal before us.

11. We have heard rival contentions of both the parties and perused the materials available on record. Ld. DR relied on the order of AO whereas Ld. AR relied on the order of Ld. CIT(A). Ld. AR submitted that audited statement

showing claim of depreciation u/s. 32 of the Act which is placed on page 4 of the paper book and depreciation claim in audited statement was at ₹15,06,49,470/- only. Ld. AR further submitted that undertaking which was sold during the previous year as specified by AO in his assessment order was going concern. Therefore the sale proceed of those undertaking will not be adjusted against WDV of the respective block. There was no provision under the income tax Act for charging the undertaking as slum sale the concept of slum sale has been brought under the tax net by the Finance Act, 1999 with effect from 01.04.2000 and instant case, does not fall under the category of slum sale. The Ld. AR has submitted the decision of ITAT in assessee's own case, which is placed in paper book on pages 87 to 101, wherein the this Tribunal has decided the issue in favour of assessee. From the above discussion, we find that AO has reduced the WDV of the respective block out of the sale proceed from the sale of undertaking as going concern. However, the same was disallowed by Ld. CIT(A). Ld. AR of assessee relied in assessee's own case, wherein relief was granted in favour of assessee in **ITA No. 1020/Kol/2007** dated 29.02.2008, where it was decided:-

> *"Thus, for determining the capital gain, from the full value of the consideration received or accruing as a result of transfer of capital asset, cost of acquisition of asset as well as cost of any improvement of such asset is to be reduced/. If cost of improvement of a particular asset cannot be ascertained than capital gain cannot be computed. While taking this view, we derive support from the decision of Hon'ble Apex Court in the case of B.C. Srinivasa Setty (supra) relied upon by the Ld. Counsel for the assessee. The ITAT Hyderabad Bench in the case of* Coromandel Fertilisers Ltd. *((supra) held that it is not possible to determine the cost of improvement of an undertaking, specially when undertaking has so many intangible asset, like trade mark, licence, goodwill etc. We entirely agree with the above conclusion of the ITAT, Hyderabad bench. In view of above, we respectfully following the decision of Hyderabad Bench in the case of* Coromandel Fertilisers Ltd. *(supra) uphold the order of the Ld. CIT(A) and dismiss the revenue's appeal".*

Taking a consistent view in assessee's own case and the decision of ITAT Hyderabad Bench in the case of Coromandel Fertilisers (supra), we confirm the order of Ld. CIT(A) and this ground of Revenue's appeal is dismissed.

12. Next ground raised by Revenue in this appeal is that Ld. CIT(A) has erred in holding the consideration received on sale proceed of assessee's agro chemical undertaking is not liable to tax as Short Term Capital Gain (STCG for short) u/s 50 of the Act or as Long Term Capital Gains (LTCG for short).

During the year under consideration assessee has sold its agro chemical undertaking for a value of ₹30 crores on which assessee earned profit and same was declared as LTCG after adjusting the brought forward loss under head 'LTCG'. The AO during the assessment proceedings found that in the earlier year, the assessee claimed Long Term Capital Loss from the sale of undertakings, but then the AO disallowed the same and adjusted the sale proceed of those undertakings against the WDV of the respective block of asset and if any gain arose then it was worked out as short term capital gain within the provisions of section 50 of the Act. Therefore, the AO held the sale proceed should be adjusted from the relevant block of asset and depreciation should be allowed on WDV at the end of the year.

Aggrieved, assessee preferred appeal before Ld. CIT(A) who has dismissed the plea of assessee by observing as under:-

> *"2) Capital Gains – The appellant derived long term capital gains of Rs.11.73 crores on the transfer of agro-chemical undertaking. The AO held that the capital gain is required to be computed as per section 50 of the IT Act since the appellant has received a lumpsum sale consideration for the sale of the business. The AO computed short term capital gains as per section 50 for the transfer of the agro-chemical undertaking.*
>
> *The appellant contends that the AO erred in not accepting the appellant 's computation of long term capital gain on the transfer of agro-chemical unit. It is contended that the AO ought to have considered the transfer of undertaking as a going concern for slump price. It is contended that the undertaking is a capital asset within the meaning of section 2(14). It*

is submitted that the AO ought to have accepted the capital gain computation of the appellant. It is prayed that the computation be accepted.

The appellant sold agro-chemical undertaking for a lumpsum price of Rs.30 crores. The details regarding the valuation placed for various assets are not furnished. In such slump sale, the capital gains tax is not leviable as per the decision of ITAT in the case of Corromondal Fertilisers Ltd. v. DCIT *(2004) 84 TTJ 370 (Hyd). Hence, in the slump sale of the agro-chemical undertaking as a going concern, the levy of capital gains is not exigible. The AO is directed not to levy the capital gains on the transfer."*

Aggrieved, Revenue is in appeal before us.

13. We have heard rival contentions of both the parties and perused the materials available on record. Before us Ld. DR vehemently relied on the order of AO whereas Ld. AR relied on the order of Ld. CIT(A). Ld. AR submitted that for the working of capital gain from the full value of the sale consideration received or accruing as a result of transfer of capital asset, cost of acquisition of asset as well as cost of any improvement of such asset is to be reduced. If cost of improvement of a particular asset cannot be ascertained than capital gain cannot be computed. While taking this view, he derive support from the decision of Hon'ble Supreme Court in the case of B.C.Srinivasa Setty 128 ITR 294 relied upon by the him. The ITAT Hyderabad Bench in the case of *Coromandel Fertilisers Ltd.* 90 ITD 439 (Hyd) (supra) held that it is not possible to determine the cost of improvement of an undertaking, especially when undertaking has so many intangible asset like trade mark, licence, goodwill etc. We entirely agree with the above conclusion of the ITAT Hyderabad Bench in the case of *Coromandel Fertilisers Ltd.* (supra) hence, we uphold the order of Ld. CIT(A) and dismiss the Revenue's appeal.

14. Next ground raised by Revenue in this appeal is that Ld. CIT(A) erred in treating the deemed recovery of ₹16,88,335/- as the actual recovery thereby erred in deleting the demand.

15. During the assessment proceedings AO found that assessee has incurred various expenses in relation to guest house accommodation such as maintenance, rent and repair expenses. Against the above heads of expense, assessee has shown certain deemed recovery for an amount of ₹16,88,335/- this deemed recovery was to be recovered from the staff of the assessee-company. AO held that deemed recovery of ₹16,88,335/- cannot be treated as actual recovery, therefore, cannot be allowed as deduction. Aggrieved, assessee preferred appeal before Ld. CIT(A) who has deleted the addition made by AO by observing that assessee recovers the amount of ₹16,88,335/- from its employees for the use of guest house.

Aggrieved, Revenue is in appeal before us.

16. We have heard rival contentions of both the parties and perused the materials available on record. Before us, Ld. DR vehemently relied on the order of AO whereas Ld. AR relied on the order of Ld. CIT(A). Ld. AR has submitted that recovery from the employees for the use of guest house was allowed in its own case by this Tribunal in **ITA No. 347/Kol/1997** dated 18.02.2001. Respectfully, following the decision of this Tribunal we decide this issue in favour of assessee. This ground of Revenue's appeal is dismissed.

17. In the result, Revenue's appeal is dismissed.

Coming to cross-appeals of assessee and Revenue in ITA No.2048 & 2355/Kol/2005 for A.Y. 1996-97

18. The ground of appeal raised by the assessee are as under:-

ÏTA No. 2048/Kol/2005

1) *That the ld. CIT(A) ought to have quashed the entire order dt. 1.3.2005 u/s. 154/254/251/143(1)(a) of the IT Act, which has been issued beyond the time limit prescribed under the provision of the IT Act namely within four years from the date of the order u/s.143(3) dt. 18.3.99 of IT Act which is sought to be amended u/s. 154 of IT Act.*
2) *Without prejudice to what has been sated in (1) above*
   a) *The ld. CIT(A) wrongly interpreted the provision of Section 80M of IT Act in concluding that the exemption for dividend to be allowed should be net off dividend received after deducting tax at source.*
   b) *That the ld. CIT(A) failed to appreciate that the claim made by the Appellant u/s. 80I/80IA is only for the manufacturing activities and in accordance with the provision of the IT Act.*
   c) *That the ld. CIT(A) wrongly deducted the losses arising out of trading activities for the purposes of allowing claim u/s 80I/80IA thereby erred in reducing the claim made by the Appellant.*

The ground of appeal raised by the Revenue are as under:-

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deducting the amount of Rs.1,24,20,000/- u/s. 80-O. He opined that the convertible foreign exchange brought by assessee in India for technical knowhow services will be eligible for deduction u/s. 80-O. Here the AO was justified in stating that there is no foreign exchange earning which the assessee has claimed on account of income from commission on indenting business.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred I allowing deduction of excise and customs duty of Rs.559.15 lacs u/s/. 43B. This liability is a part of closing stock, excise duty paid after 31.3-96 has been debited to P&L A/c. for the A.Yr. 197-98. Hence, deduction u/s/ 43B in respect of excise duty paid can be allowed only after withdrawing the amount debited on account of excise duty payment for A.Yr. 197-98."

19. First we take up assessee's appeal in ITA No. 2048/Kol/2005.

First issue raised by assessee in this appeal is that Ld. CIT(A) ought to have quashed the entire order dated 11.03.2005 u/s 154/254/251/143(1)(a) of the Act which have been issued beyond the time-limit prescribed under the provisions of the Act, namely within four years from the date of the order passed u/s 143(3) dated 18.03.1999 of the Act which is sought to be amended u/s. 154 of the Act.

20. At the outset, Ld. AR of assessee submitted that the Assessing Officer has issued intimation u/s. 143(1)(a) of the Act dated 27.03.1997 and same intimation was rectified u/s. 154 of the Act on 17.12.1998 whereby certain additions and disallowances were made in the return of the income of the assessee. Thereafter the case was selected under scrutiny assessment u/s. 143(3) of the Act and accordingly the assessment was framed by passing order under section 143(3) of the Act on 18.03.1999. We find that once the matter has been taken up under scrutiny assessment by issuing a notice under section 143(2) of the Act then the earlier rectification order passed under section 154 of the Act has no validity in the eyes of law. Accordingly the appeal filed by the assessee to ld. CIT(A) becomes invalid. Similarly the appeal filed either by the assessee or Revenue against the order of ld. CIT(A) to ITAT becomes invalid. Accordingly the Ld. AR prayed for quashing the rectification order passed under section 154 on dated 17.12.1998, ld. CIT(A) order and appeal to the ITAT. In support of his claim, the ld. AR drew our attention to the page of 168 of the paper book, wherein in assessee's own case in **ITA No. 501/Kol/2002** ITAT Kolkata has quashed the proceedings of section 154 of the Act in para-2 of this order, which reproduced below:-

> *"2. To adjudicate on the controversy arising out of the appeals, it is suffice to take note of the fact that the impugned order under s. 154 read with section 143(1)1(a) was passed after insurance of notice under s. 143(2) of the Act. The law in this matter is fairly settled by the decision of the P & H High Court in the case of* CIT v. Arihant Industries Ltd. *(255 ITR 458) wherein it has been held that proceedings u/s. 154 cannot be initiated after issuance of notice u/s. 143(2).*
>
> *3. In the result, the assessee's appeal is allowed while the revenue's appeal is dismissed."*

We understand from the aforesaid discussion that the issue of notice for rectification and passing of orders under section 154 to rectify the intimation and to make additions and disallowances to the income indicated therein has been agitated by taxpayers before Courts and Tribunals in various cases. It has been pleaded that when once regular assessment is taken up for scrutiny

and notice issued under sections 142 and 143 of the Act, the Assessing Officer has no jurisdiction or authority to rectify the intimation and to enlarge the amount of income as well as tax and interest specified therein. The reason for such a plea is that the intimation gets superseded the moment notice under section 142(1) read with section 143(2) is issued for scrutiny assessment. The analogy for this plea is drawn from the fact that a notice for reassessment issued under sections 147 and 148 of the Income-tax Act has the effect of superseding the assessment already made on the assessee and thereby removing the finality to the assessment already made, whether or not it is the subject-matter of further proceedings in appeal, revision etc. and therefore intimation does not survive after the issue of notices under section 142(1) and 143(2) which culminate into the order of assessment passed under section 143(3) which is appealable and is also open to revision depending upon the issues involved and the power sought to be invoked for the purpose of appeal by the assessee or revision of assessment by the Commissioner under section 263 of the Income-tax Act.

20.1 We are also making the references to the following orders of the courts on the above stated subjects.

The Calcutta High Court in *Modern Fibotex India Ltd. vs. Dy. CIT (1995)* 126 CTR (Cal) 69*: (1995) 212 ITR 496 (Cal)* has held that the Assessing Officer has no jurisdiction to make any addition or disallowance to the income of the assessee returned by him and acknowledged/accepted in the intimation issued under section 143(1) by resorting to issue of notice under section 154 for rectification of mistakes after the regular assessment proceedings have commenced by issue of notice under section 143(2) and the Assessing Officer is seized of the entire facts and issues involving the assessee relating to his assessment. The notice and order for rectification under section 154 were held to be unsustainable as the Assessing Officer cannot at that stage consider any item to be *prima facie* inadmissible for the purpose of making adjustments to the returned income to enhance the tax liability of the

assessee. This view was followed and reiterated by the Calcutta High Court in *Coates of India Ltd. vs. Dy. CIT (1995) 128 CTR (Cal) 30 : (1995) 214 ITR 498 (Cal).* The Gujarat High Court in *Gujarat Poly-Avx Electronics Ltd. vs. Dy. CIT (1996) 135 CTR (Guj) 141 : (1996) 222 ITR 140 (Guj)* has expressed the same view and quashed the additions through rectification proceedings to modify the intimation issued under section 143(1).

20.2 The Delhi High Court in *CIT vs. Punjab National Bank (2001) 166 CTR (Del) 340 : (2001) 249 ITR 763 (Del)* has also held that during the pendency of proceedings for regular assessment and after the issue of notice under section 143(2), the Assessing Officer has no jurisdiction to invoke his powers under section 154 of the Income-tax Act as the intimation issued under section 143(1)(a) would cease to be operative. The Punjab & Haryana High Court in *CIT vs. Arihant Industries Ltd. (2002) 176 CTR (P&H) 630 : (2002) 255 ITR 458 (P&H)* has also expressed the same view and further held that parallel proceedings for making the same additions and disallowances through rectification proceedings under section 154 and assessment proceedings under section 143 by the same Assessing Officer for the same assessment year against the same assessee cannot be permitted nor can be justified in law. The Punjab & Haryana High Court has reiterated the same view again in the recent case of *CIT vs. Haryana State Handloom & Handicrafts Corpn. Ltd. (2011) 336 ITR 699 (P&H).*

20.3 The Karnataka High Court in *CIT vs. Manjit Singh Sachdeva (2009) 310 ITR 357 (Kar)* has also held that no action for rectification is permissible to modify the Intimation after regular assessment is taken up under section 143(2).

The Supreme Court in *CIT vs. Gujarat Electricity Board (2003) 181 CTR (SC) 28 : (2003) 260 ITR 84 (SC)* has also made it clear that the intimation issued under section 143(1)(a) cannot be the subject-matter of proceedings in rectification under section 154 when once the regular assessment under

section 143 is taken up against the assessee as the intimation would cease to operate on assessment being made under section 143(3). To the same effect is also the judgment of the Allahabad High Court in *CIT vs. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd. (2010) 191 Taxman 377 (All).*

20.4 From the above, we find that rectification order made u/s 154 of the Act has been quashed and held as void *ab initio* in several cases. We are also relying in assessee's own case of assessee in ITA No. 501/Kol/2002 (supra) for the same relevant year. Keeping in view of this Tribunal's order in assessee's own case in **ITA No. 501/Kol/2002** (supra) we also quash the order passed u/s 154 of the Act by AO. Accordingly, the ground raised by assessee is allowed.

21. Since the principal issue u/s 154 of the Act in assessee's appeal regarding the validity of the rectification order is allowed in favour of assessee, then the remaining grounds of assessee's appeal do not call for any adjudication at this stage.

22. In the result, assessee's appeal is allowed.

Coming to Revenue's appeal in ITA No. 2355/Kol/2005

23. Hence, we allow the assessee's appeal in **ITA No. 2048/Kol/2005** in para 18 by this order in favour of assessee, the appeal of Revenue does not require any adjudication.

24. In the result, Revenue's appeal is dismissed.

Coming to assessee's appeal in ITA No. 487/Kol/20006 A.Y. 98-99

25. The assessee raised the following grounds in this appeal:-

"1) The ld. CIT(A) has erred in not accepting the Appellant's computation of Long Term Capital Loss of Rs.8,44,04,540 on transferred of "New Fibres Undertaking" by holding that the sale consideration in respect of "New Fibres Undertaking" is to be treated and taxed as per provisions of Section 50 of the Act.

2) The ld. CIT(A) has erred in not following the principles laid down by the Supreme Court with regard to taxation of Capital Gains/Loss on transfer of Undertaking as a "Going Concern" for a slump price.

3) The ld. CIT(A) failed to appreciate that the transfer of "New Fibres Undertaking" of the Appellant constituted capital assets within the meaning of Section 2(14) of the IT Act and so ought to have accepted your Appellant's computation of Capital Loss arising from transfer of this Undertaking.

4) That the learned Commissioner of Income-tax (Appeals) hereinafter referred to as CIT(A) has erred in disallowing Income-tax Depreciation claim of the Appellant amounting to Rs.15,64,30,803 on the WDV of the block of assets (excluding the Undertakings transferred) of the Appellant.

5) The ld. CIT(A) has erred in disallowing provision for royalty and technical know-how fees amounting to Rs.18,83,500 on the ground that from such provision no tax has been deducted at source and paid to the Government.

6) The ld. CIT(A) failed to appreciate that payment of royalty and technical know-how fees amounting to Rs.18,83,500 had not become due on as 31st March 1998 and as such the question of deduction of tax at source and payment thereof to the Government did not arise.

7) The ld. CIT(A) has erred in not allowing the liability which has crystallized during the assessment year 1998/99 for VRS compensation of Rs.18,50,00,000

8) The ld. CIT(A) failed to appreciate that on signing of the severance agreements by the employees opting for voluntary retirement the liability towards payment of the total compensation to such optees arises and the same is allowable in accordance with the Supreme Court decision.

9) The ld. CIT(A) failed to appreciate that the act that payment of compensation would be made in future cannot negate the fact that liability towards payment of the total compensation has crystallized during the year.

10) Assuming but not admitting that the VRS compensation is not allowable on the basis of liability which has crystallized at the time of signing of agreement by the employee optining for VRS, the Joint Commissioner of Income-tax (JC) has erred in not allowing at least the payment during the assessment year amounting to Rs.11,29,56,000 based on CBDT Circular wrongly interpreting the provision of IT Act which is bad in law and also not binding on the assessee.

11) The ld. CIT(A) erred in not allowing 100% Depreciation on Electrical Motor car in accordance with the classification under Appendix 1 of IT Rules, 1962.

12) The ld. CIT(A) erred in allowing only Rs.7,62,839 u/s. 80HHC of IT Act as against the App's entitlement of Rs.83,69,371.

13) The ld. CIT(A) has wrongly levied interest amount to rs.2,44,37,886 under section 234B and Rs.2,23,617 under section 201(IA) of IT Act."

26. At the time of hearing Ld. AR of assessee submitted that he has been instructed not to press ground No.1 to 3, 5, 6 & 11 of this appeal. Ld. DR raised no objection regarding the action of Ld. AR for not pressing these grounds. Hence, we dismiss those grounds of assessee's as not pressed.

27. Next ground raised by asssessee's appeal is that Ld. CIT(A) has erred in disallowing income tax depreciation of ₹15,64,30,803/- on the WDV of the block of asset.

During course of assessment proceedings, AO found that assessee has sold certain undertaking as a going concern for a certain value in the earlier years. The assessee has shown the sale proceed of those undertakings as either capital gain or loss. But the AO was not satisfied with the working of the assessee and enquires why the sale proceed of the undertaking should not be considered as per the provision of Sec. 50 of the Act. The AO held that In case any depreciable asset is sold out then the sale proceed are reduced from the WDV of asset of the respective block and depreciation is charged on the closing WDV as appearing at the yearend in assessee's books of account. The then AO has disallowed the claim of the assessee in earlier years for taking the sale proceeds as capital gain. So, in this case also, AO has

reduced the WDV from the sale proceed of the undertaking as the assessee failed to provide the respective value of the assets of the undertaking. Therefore, AO held that depreciable will be allowed on the WDV as appearing at the yearend and he disallowed the claim of assessee under the head 'capital gain / loss' as a result of sale of undertaking. The AO also found that same practice was followed by Revenue in case of assessee in earlier years. So, AO has disallowed the same and added to total income of assessee. Aggrieved, assessee preferred appeal before Ld. CIT(A) who has upheld the action of AO by observing as under:-

> *"7. I have carefully considered the submission of the appellant company in respect of the above two related material grounds. Similar issue came up I appeal No. 44/CIT(A)-X/Cir.10/05-06 for assessment year 1999-2000. In my order dated 1/9/05 the matter was elaborately discussed in para 10, page 5-7. After having duly considered the submission, merit and facts of the case at length, the issue was decided against the appellant company thereby upholding the AO's order in this regard. The present two material issues being absolutely identical, ground no. 2-5 are dismissed following the aforesaid order."*

28. Being aggrieved by this order of Ld. CIT(A) assessee preferred appeal before us.

29. We have heard rival contentions and gone through the facts and circumstances of the case. Ld. DR vehemently relied on the orders of authorities below. Before us, Ld. AR submitted that in the own case of the assessee for AY 1994-95 in **ITA No. 1020/Kol/2007** dated 29.12.2008, wherein it was held by this Tribunal as under:-

> *"After reading the agreement as a whole, we find that the fertilizer business of the assessee has been transferred as a going concern to CCFC. All assets and liabilities relating to fertilizer business has been transferred, only assets excluded are bank balance and the outstanding insurance claim on the date of transfer. Merely because these two assets have been excluded from the assets transferred, it cannot be said that it is not the transfer of the undertaking as a going concern Land, building, plant & machinery, raw material, industrial because, technology, trade mark have been transferred to CCFC. The employees of the assessee working in fertilizer business have also been taken over*

by the CCFC. All current liabilities relating to fertilizer because as been taken over by CCFC. The sale consideration of the undertaking as a whole has been fixed at a "slump price" of Rs.70,00 crores without specifying any specific value to any asset. The assets transferred includes tangible as well as intangible asset. Moreover, the seller i.e the assessee has also agreed for not carrying on the similar business of manufacturing and marketing of urea fertilizer for a period of 10 yeas. This is evident from Para 4 of Chapter VIII of the Agreement, the same is reproduced as under:-

> 'ICI further agrees for a period of 10 years from the Transfer Date not to manufacture, market, distribute, sell or otherwise deal in India in urea fertilizer or ammonia for conversion into urea either on its own account or through any of its subsidiaries and/or other group companies, without obtaining the prior written consent of CCFC.'

*This clause is of the nature of non-competing agreement for which no separate consideration is charged but it is also considered in the lump sum consideration of Rs.70.00 crores. Considering the totality of the above facts, we are of the opinion that it is a case of "***slump sale***" of undertaking as a going concern and not the sale of depreciable assets within the meaning of Section 50 of the Income Tax Act. We, therefore, agree with the Ld. CIT(A) that the Assessing Officer was not justified in applying the provisions of Section 50 of the Income Tax Act."*

We find that this Tribunal was decided in favour of assessee. Similar issue was raised in the assessment year 96-97 in ITA No. 850/kol/2007 where the relief has been granted to the assessee. From the aforesaid discussion and respectfully following the decision of this Tribunal in assessee's own case for AY 1994-95 in **ITA No. 1020/Kol/2007** dated 29.12.2008 and keeping the constant view in the instant case, hence, we allow this ground of assessee's appeal.

30. Next grounds No. 7 to 10 raised by assessee in this appeal which reproduced as under:-

"7) The ld. CIT(A) has erred in not allowing the liability which has crystallized during the assessment year 1998/99 for VRS compensation of Rs.18,50,00,000/-

8) The ld. CIT(A) failed to appreciate that on signing of the severance agreements by the employees opting for voluntary retirement the liability

towards payment of the total compensation to such optees arises and the same is allowable in accordance with the Supreme Court decision.

9) The ld. CIT(A) failed to appreciate that the act that payment of compensation would be made in future cannot negate the fact that liability towards payment of the total compensation as crystallized during the year.

10) Assuming but not admitting that the VRS compensation is not allowable on the basis of liability which has crystallszed at the time of signing of agreement by the employee optioning for VRs, the Joint Commissioner of Income-tax (JC) has erred in not allowing at least the payment during the assessment year amounting to Rs.11,29,56,000 based on CBDT Circular wrongly interpreting the provision of IT Act which is bad in law and also no binding on the assessee."

31. We have already decided the similar issue in **ITA No. 850/Kol/2007** in **para-8** by this order and taking a consistent view and in terms of above, we allow these grounds of appeal raised by assessee.

32. Next ground raised by assessee in this appeal is reproduced below:-

"12) The ld. CIT(A) erred in allowing only Rs.7,62,839/- u/s/. 80HHC of IT Act as against the Appellant's entitlement of Rs.83,69,371/-"

33. Since this ground of assessee's appeal is consequential in nature, we therefore direct the Assessing Officer to give the effect of the date of order in working out the deduction as specified under section 80HHC as per law. So this ground of appeal does not require any adjudication. Hence, this ground of assessee's appeal is allowed for statistical purpose.

34. In the result, assessee's appeal is partly allowed.

Coming to Revenue's appeal in ITA No. 507/Kol/2006 for A.Y. 98-99

35. Issue raised by Revenue in this appeal is that Ld. CIT(A) has erred in holding the up-gradation cost on account of millennium up-gradation cost amounting to ₹1.05 crores as revenue expenditure and allowable deduction u/s. 37(1) of the Act.

36. During the year assessee has incurred an amount of ₹ 1.05 crores in connection with Y2K compliance in various business location of the company. The purpose was to have the constant flow of data among the different locations of the business. The assessee submitted that to make the computer system Y2K compliant it was not necessary to introduce fresh computers, as such, but only some new chips had been introduced in the existing computer system. Otherwise, the entire computer system of the assessee would have become ineffective in the new millennium. However, the AO found that as a result of these changes, the life of the computer has got a new lease of life otherwise entire computer system would have become scrap. The AO also noted that there were 3 years left for the for the millennium year to come and there was no immediate requirement to incur the up-gradation cost. Accordingly the AO held that expenditure amounting to ₹ 1.05 crores has, in fact, introduced in new computer equipment capable of working in the new millennium and hence, the expense thus incurred is treated as capital expenditure. Therefore, AO disallowed the said sum and added it to the total income of assessee.

Aggrieved, assessee preferred appeal before Ld. CIT(A) who deleted the addition made by AO.

37. Being aggrieved by this order of Ld. CIT(A) Revenue preferred appeal before us.

38. We have heard rival contentions of both the parties and perused the materials available on record. Ld. DR vehemently relied on the order of Assessing Officer whereas Ld.AR relied on the order of Ld. CIT(A). Before us Ld. AR submitted that business of assessee is located in different place of the country and most of the expenditure incurred on making the computer Y2K compliant was in the nature of travelling and no enduring benefit is arising from making of existing computers of Y2K compliant only some small chips are required to upgrade the system. From the above discussion, we find that

the major expenses were incurred on travelling to make the computer system of assessee Y2K compliant and no new fixed asset was purchased by assessee. Therefore, we treat the expenses incurred to make computer system Y2K as revenue expenditure. We are also relying in ITAT Delhi Bench in the case of *Asahi India* 203 taxmann 277 (Del) and in the case of *Raychem National Stock Exchange* 346 ITR 138 (Bom), wherein such expenditures were held as revenue expenditure. Therefore, we find that no new fixed asset is coming into existence out of the Y2K compliance . Taking a consistent view of ITAT Delhi and Mumbai Benches, in the case of *Asahi India cleod Russell* (supra) and in the case of *Raychem National Stock Exchange* (supra) we are not inclined to interfere in the order of Ld. CIT(A) and this ground of Revenue's appeal is dismissed.

39. Next ground raised by Revenue in this appeal is that Ld. CIT(A) has erred in allowing the deduction u/s.43B of the Act for the contribution of ₹19,26,537/- made towards PF/pension.

40. During the course of assessment proceedings, AO found that assessee has violated the provisions of u/s 43B of the Act. The assessee has not deposited PF/EPF/PPF within the due date as prescribed under the respective Act, therefore AO disallowed the same and added it to the income of assessee. Assessee preferred appeal before Ld. CIT(A) who has deleted the addition made by AO.

41. Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us.

42. We have heard rival contentions and gone through the facts and circumstances of the case. Ld. DR vehemently relied on the order of Assessing Officer whereas Ld. AR supported the order of Ld. CIT(A). Before us, Ld. AR drew our attention in assessee's own case in ITA No. 851 &

1018/Kol/2007 for AY 2000-01 this Tribunal has decided this issue in favour of assessee and against the Revenue. We are also relying in the decision of Hon'ble Supreme Court in the case of *CIT v. Alom Extrusions Ltd.* 319 ITR 306 (SC), wherein the payment made for PF/EPF/FPF before filing income tax return will be allowed in the relevant year. Respectfully following the decision of Hon'ble Supreme Court in the case of *Alom Extrusions Ltd.* (supra) we approve the conclusion arrived at by Ld. CIT(A) and decline to interfere. This ground of Revenue's appeal is dismissed.

43. In the result, Revenue's appeal is dismissed.

44. **In combine result, appeals filed by assessee in ITA No. 850/Kol/2007, 2048/Kol/2005 are allowed & 487/Kol/2006 is partly allowed and that of Revenue's appeal in ITA No. 1021/Kol/2007, 2355/Kol/2005 and 507/Kol/2006 are dismissed.**

Order pronounced in the open court 27/11/2015

Sd/-	Sd/-
(Mahavir Singh)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp
दिनांकः- 27/11/2015 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee –ICI India Ltd., 8B, Middleton Street, Kolkata-71
2. राजस्व/Revenue-ACIT/DCIT, 3 Govt. Place (West) Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।